

Ku (Migration) [2019] AATA 2453 (24 April 2019)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Ms Chia-Chen Ku
CASE NUMBER:	1718214
HOME AFFAIRS REFERENCE(S):	BCC2016/1904612
MEMBER:	Hugh Sanderson
DATE:	24 April 2019
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa: • cl.820.211(2) of Schedule 2 to the Regulations; and • cl.820.221 of Schedule 2 to the Regulations.

CATCHWORDS

MIGRATION – Partner (Temporary)(Class UK) visa – Subclass 820 (Partner) – not satisfied parties in genuine and continuing relationship – valid marriage – further documentation provided consistent information as to relationship – credible evidence – high degree of commitment – relationship genuine and continuing – decision under review remitted

LEGISLATION

Migration Act 1958 (Cth), ss 5, 65
Migration Regulations 1994, Schedule 2, r 1.15, cls 820.211, 820.221

CASES

He v MIBP [2017] FCAFC 206

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration and Border Protection to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 31 May 2016 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations).
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211(2) because the delegate was not satisfied the applicant was the spouse, as defined in s.5F of the Act, of the sponsoring partner.

Background

4. The applicant is a citizen of Taiwan and is currently 26 years old. Her parents and a sister continue to live in Taiwan. The applicant first entered Australia on 13 October 2012 holding a Working Holiday visa. She was then granted a Student visa. She has resided primarily in Australia since then.
5. The sponsor of the applicant is David Dempsey. He was born in Australia and is an Australian citizen. He is currently 50 years old. He was previously married and has four children of that relationship, Jade currently 30, Amy currently 26, Trent currently 24 and Dana currently 22 years old. He divorced his wife on 22 February 2016.
6. The parties claimed they first met each other over the internet in about October 2014. The applicant, at that time, was living in Adelaide and the sponsor was living in Sydney. The applicant travelled to Sydney with two friends in December 2014 and met the sponsor in person. He proposed marriage to her and she accepted subject to her parents' approval. They then obtained the consent of the applicant's parents to the marriage. In March 2015 the parties began living together and were married on 29 March 2016.
7. Since 2014, she has travelled out of Australia as follows:
 - From 6 May 2015 to 19 May 2015 (with the sponsor);
 - From 2 March 2017 to 24 March 2017 (with the sponsor);
 - From 10 May 2018 to 2 June 2018 (with the sponsor); and
 - From 19 November 2018 to 25 December 2018.
8. The applicant provided little information when the application was filed. Despite the Department requesting further information and the applicant's agent promising that information was being prepared, no further information was provided.
9. The delegate who considered the application was not satisfied that on the very limited information that was provided that the parties were in a genuine and continuing relationship. The delegate found that the applicant was not the spouse of the sponsoring partner as defined in s.5F of the Act. The delegate found the applicant did not meet the criteria in cl.820.211(2) and refused the application.

Information to the Tribunal

10. The applicant provided further documents to the Tribunal including the following:
 - Statements by the parties in support of the application;
 - Statements by friends and family members, including children of the sponsor, in support of the application;
 - Photos of the parties together in various social events in Australia and Taiwan;
 - Evidence of the parties travelling together in Australia and overseas;
 - Facebook pages of the applicant; and
 - Correspondence addressed to the parties at the home they claim to share.
11. The applicant appeared before the Tribunal on 24 April 2019 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages. The applicant was represented in relation to the review by her registered migration agent who attended the hearing.
12. The parties provided consistent information as to various aspects of their relationship. This included details of the start of their relationship, where they are currently living, their work, their travels together and the relationship they have with various family members. The parties gave evidence in a credible manner.
13. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

14. The issue in the present case is whether the applicant is the spouse, as defined in s.5F of the Act, of the sponsoring partner.

Whether the parties are in a spouse or de facto relationship

15. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen.
16. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

17. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The parties were married on 29 March 2016. There is nothing to indicate that the marriage between the parties is not valid. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spouse relationship met?

Financial aspects

18. Neither the applicant nor the sponsor has any significant assets of their own and it is not surprising, therefore, that they do not jointly own any significant assets or have any significant joint liabilities. The parties provided consistent information as to the financial arrangements within their home, including details of how they share the day to day household expenses, the payment grocery and other bills. The parties have a joint bank account which they are using to save money for their future plans, including overseas travel and hopefully purchasing a home together. They otherwise have accounts in their sole names into which their income is deposited. The parties were aware of each other's financial circumstances.
19. Although limited due to the limited financial resources of the parties, the information provided as to their financial aspects is consistent with the parties being in a genuine and continuing relationship. The parties are sharing their day-to-day household expenses indicating that they live together.

Household

20. The parties provided details of the various homes they have lived together and the arrangements within those homes. This included details of when family members have stayed with them. The parties provided consistent information as to the living arrangements within the homes they have lived in together, including the arrangements for doing the house work including cooking and cleaning, and other activities they have participated in together.
21. The Tribunal finds the parties had been living together since March 2016 in shared accommodation and that the arrangements within the homes they have lived indicates they are living together with a mutual commitment to a shared life as husband and wife to the exclusion of all others and that their relationship is genuine and continuing.

Social aspects

22. The parties have travelled overseas together to Taiwan to spend time with the applicant's family who live there. The applicant only finally agreed to marry the sponsor after the sponsor had asked her parents for their approval of the marriage which was given. One of the issues that the parties acknowledged as being a consideration for the approval of the marriage was the age difference between the applicant and the sponsor. The applicant acknowledged that her father was initially concerned about this issue, however, after meeting and spending time with the sponsor he was supportive of the relationship between the sponsor and his daughter.
23. The parties provided further evidence of the social activities they have participated in together as a couple. This has included travelling together in Australia and participating in various social functions. Their friends and relatives have provided statements in support of

the application claiming that the parties do represent themselves as being married to each other and that their relationship is recognised and approved of by them.

24. The Tribunal finds that the social aspects of the relationship support a finding that the parties have a mutual commitment to a shared life as husband and wife to the exclusion of all others and that their relationship is genuine and continuing. The parties have previously participated in various social activities together and have plans future travel and social activities.

Commitment to each other

25. The parties first met each other over the internet in October 2014. They first met in person when the applicant travelled from Adelaide, where she was living, to Sydney to spend New Year's Eve in Sydney with the sponsor. It was claimed the sponsor first proposed marriage to the applicant at that time. The applicant agreed to the proposal at that time, subject to her parents' approval. It was explained that the proposal of marriage was made by the sponsor at that time so that he could show to the applicant that he was hoping to commit to a long-term relationship at that time. The parties started living together in March 2015 with the sponsor transferring her studies from Adelaide to Sydney. After the sponsor obtained the permission from the applicant's parents, he again proposed marriage to the applicant and she agreed. They were married on 29 March 2016. They have now been married for more than three years.
26. The parties displayed the degree of knowledge of each other's personal lives expected of couples who provide a high degree of companionship and emotional support to each other. This included providing details of the difficult relationship the sponsor has with his two youngest children. The sponsor was able to provide details of certain medical issues suffered by the applicant and how this may affect her capacity to have children.
27. One of the issues that the parties have confronted is their difference in age. The applicant provided an explanation as to why, despite the sponsor being significantly older than she is, she found him to be a person who she wished to live with on a permanent basis. The issue has been addressed with the applicant's parents with her parents giving their consent and support to the relationship. The difference in age and other aspects of the relationship have not been so readily accepted by the sponsor's younger children. This, in part, is due to the divided loyalties his children have between the sponsor and his former wife with whom they continue to live. The sponsor's two eldest children, however, have embraced the relationship and are supportive of the sponsor's relationship with the applicant.
28. The parties provided consistent information as to their plans for their future together. This includes where they would be living, their plans for travelling together and the support they will give each other in the future.
29. The Tribunal finds that the parties have a high degree of commitment to each other and their relationship. They provide each other the degree of companionship and emotional support which would be expected of parties who have a mutual commitment to a shared life as husband and wife and where the relationship is genuine and continuing.

Overall assessment

30. The Tribunal has considered all the circumstances of the relationship both individually and cumulatively. Although the relationship seems to have commenced at an extraordinarily fast pace, the Tribunal accepts the reasons given for this rapid development with the parties starting to live together after having spent only a short time and each other's presence. It was only after the applicant's parents gave their consent that the parties married.

31. The Tribunal has considered all the circumstances of the relationship both individually and cumulatively. The Tribunal finds the weight of evidence supports a finding that the parties have a mutual commitment to a shared life as husband and wife to the exclusion of all others, that their relationship is genuine and continuing and that they live together on a permanent basis.
32. On the basis of the above the Tribunal is satisfied that the requirements of s.5F(2) are met at the time the visa application was made and at the time of this decision. Therefore the applicant meets cl.820.211(2)(a).
33. At the time of the application and at the time of this decision the applicant was sponsored by the applicant spouse who had turned 18 years of age. Therefore the applicant meets cl.820.211(2)(c). At the time of the application the applicant held a substantive visa and therefore the criteria in cl.820.211(2)(d) is not applicable.
34. The Tribunal finds the applicant meets the criteria in cl.820.211(2) at the time of the application and continues to meet the criteria at the time of this decision. Accordingly, the applicant meets the criteria in cl.820.221.
35. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

36. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:
 - cl.820.211(2) of Schedule 2 to the Regulations; and
 - cl.820.221 of Schedule 2 to the Regulations.

Hugh Sanderson
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).